STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2005
v	No. 253396 Kent Circuit Court
JAMES EARL MCRAE, JR., Defendant-Appellant.	LC No. 02-002085-FC

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant James McRae appeals as of right a jury trial conviction of three counts of first-degree criminal sexual conduct[1] and one count of first-degree home invasion.[2] The trial court sentenced McRae as a second habitual offender to life in prison for each count of criminal sexual conduct and twenty-five to forty years for the conviction for home invasion. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

McRae's issues on appeal relate solely to his claims that the prosecutor made numerous inappropriate comments during her closing argument, which resulted in cumulative error that denied him a fair trial. In her closing argument, the prosecutor stated that the DNA sample taken from the complainant matched McRae's. In reference to trial testimony regarding the statistical probability that the sample belonged to McRae, she stated that even though no two people have ever had the same DNA profile, "science likes to be perfect so they have given you this number as the odds of anyone else ever having that DNA." The prosecutor argued that the perpetrator was McRae beyond a reasonable doubt.

The prosecutor then addressed each of McRae's defenses. First, she stated that there was no evidence of consent as McRae suggested in a phone conversation with Detective Ralph

[1] MCL 750.520b(1)(c) (sexual penetration involving commission of another felony).

[2] MCL 750.110a(2).

Bekker. The prosecutor also noted that the testimony of several witnesses proved other acts of sexual penetration, disproved any defense of consent, and attached a modus operandi to McRae.

Next, the prosecutor addressed McRae's defense that detective Lesley Smith framed him. She stated that "as testified by [prosecution expert witness] Joel Schultze, the most you can get at one loci are two genes, one from your mother and one from your father." McRae objected on the ground that the prosecutor was not an expert in DNA. The trial court explained that the prosecutor was stating her recollection of the witness's testimony, and if she misspoke, the jury was to refer to what the witness actually said. The prosecutor continued to discount McRae's defense that he had been framed because the DNA evidence did not show anyone else as a possibility and because detective Smith had never met McRae until he took his sample.

Lastly, in response to McRae's defense that the complainant was lying, the prosecutor observed that the complainant, a nurse, and the police would all have to be lying, which they had no motive to do. Further, the prosecutor argued that the DNA, the modus operandi, and the general description the complainant gave all pointed to McRae. McRae objected because there were no 911 calls to prove what the complainant said. The trial court observed that the prosecutor's argument was consistent with the evidence and therefore allowed it.

McRae made his own closing statement and told the jury that he was not able to get adequate representation unless he represented himself. He then stated that the witnesses and officers involved lied, which was reflected by the inconsistent statements made at various times during the investigation and at trial. In response, the prosecutor said that prosecutors are supposed to see that justice is done. She also told the jury that McRae had pleaded for someone to help him, noted that he had multiple attorneys during trial, and offered her opinion that his current standby counsel was an excellent attorney. McRae objected, claiming that this argument had nothing to do with closing. The trial court ruled that the argument was in response to McRae's closing.

II. Prosecutorial Misconduct

A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.[3] Where the allegations were unpreserved, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.[4] Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.[5]

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[3] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[4] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

[5] *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

B. Statistical Probability

McRae argues that the prosecutor inappropriately made reference to the statistical probability of the offender being someone else based on DNA testing while failing to state exactly what that probability was. However, the statistical probability had already been properly admitted into evidence; therefore, no error resulted from the prosecutor's failure to restate it during closing.

McRae also challenges the prosecutor's comment that no two persons have the same DNA, because identical twins share DNA coding. A prosecutor "may not make a statement of fact unsupported by the evidence but may draw inferences for the jury from the facts of the case" in closing arguments.[6] Because the admissible evidence showed that historically no two persons except identical twins have matching DNA and no evidence that McRae has a twin was presented, we conclude that the statement was a reasonable inference from the evidence and no error resulted.

C. Comments On McRae's Courtroom Demeanor

McRae argues that the prosecutor made impermissible comments about his courtroom demeanor. To determine whether a prosecutor's remarks have resulted in misconduct, the reviewing court must "examin[e] the pertinent portions of the record and evaluat[e] the prosecutor's remarks in context.[7]

Here, the prosecutor directed the jury's attention to evidence of other similar acts presented at trial. The prosecutor described McRae's modus operandi based on those similar acts as breaking into the apartment, hiding his identity, penetrating vaginally, and penetrating anally while brandishing a knife. The prosecutor then stated, "[i]t shows his modus operandi. But most of all, ladies and gentleman, rape isn't about sex. It isn't about pleasure. Rape cases like this are about control and domination. And ladies and gentlemen, I ask you to judge based on what you've seen of defendant whether or not he enjoys control and domination." Viewing the statement in context, the prosecutor's statement as to what the jury had "seen" of McRae was a reference to what they had seen of him based on other similar acts, not what they had seen of his demeanor in the courtroom. Although the word choice was poor, we conclude that no error resulted from this comment.

D. References To McRae's Counsel

McRae claims that the prosecutor improperly referred to his previous counsel, that the prosecutor improperly commented that she had tried cases with McRae's standby counsel, and that she proclaimed his standby counsel to be a very good criminal attorney when no evidence of

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[6] *People v Viaene*, 119 Mich App 690, 697; 326 NW2d 607 (1982), citing *People v Johnson*, 112 Mich App 41; 314 NW2d 794 (1981).

[7] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

McRae's counsel was admitted into evidence. In his closing, McRae told the jury that the only way he could be adequately represented was to represent himself. In response the prosecutor stated,

> You've heard the name Mr. Murkowski. You've heard the name Helen Nieuwenhuis. You can see Mr. Trusock in the courtroom. He wants you to believe that he's incompetent as a criminal lawyer. I've had many trials with Mr. Trusock. He's an excellent attorney and he does do criminal work very well.

These comments were offered in rebuttal to McRae's argument that he could only be adequately represented if he represented himself. It has long been held that "remarks induced by and made in response to statements made by defense counsel are not subject to reversal."[8]

Additionally, "[i]t is well established that the prosecutor may not vouch for the character of a witness or place the prestige of his office behind them."[9] It is equally well established that "a prosecuting attorney may not personally attack defense counsel.[10] However, the prosecutor's comments here did not do either of those things. First, defense counsel was not a witness. Second, there was no personal attack or denigration of defense counsel; on the contrary, the statement was complimentary, and was made in response to McRae's argument that he did not have appropriate counsel.

Additionally, the trial court instructed the jury that the attorney's comments and McRae's comments were not evidence and should not be considered, which would adequately alleviate any potential prejudice to defendant.[11] Jurors are presumed to follow the court's instructions.[12] We conclude that McRae has not shown how the prosecutor's comments regarding his present attorney or his previous attorneys influenced the jury in any manner resulting in an unfair trial.

E. Doing Justice

McRae argues that the prosecutor's statement that her job was to do justice was error requiring reversal. McRae had stated that he was framed and that the prosecutor is not supposed to "make stuff up." In response, the prosecutor stated, "[h]e says that prosecutors are not suppose [sic] to make stuff up. They aren't. Actually prosecutors are suppose [sic] to see that justice is done, and that's what I am asking you to do, to do justice in this case."

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[8] *People v Foster*, 77 Mich App 604, 614; 259 NW2d 153 (1977), citing *People v Pomranky*, 62 Mich App 304, 310-311; 233 NW2d 263 (1975).

[9] *People v Bairefoot*, 117 Mich App 225, 229; 323 NW2d 302 (1982), citing *People v Yearrell*, 101 Mich App 164; 300 NW2d 483 (1980); *People v Erb*, 48 Mich App 622; 211 NW2d 51 (1973).

[10] *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), citing *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

[11] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[12] *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002).

As is clear from the context, the prosecutor's statement was a direct rebuttal to McRae's argument that the prosecution lied and created false evidence. Although prosecutors are prohibited from appealing to the civic duties of the jury,[13] we conclude that the prosecutor did not intend to, and did not, appeal to the jury's civic duty. Rather, the prosecutor correctly explained that the duty of the prosecutor is to seek justice.[14] Therefore, no clear error resulted from the comment and McRae was not denied a fair trial.

F. Cumulative Effect

McRae argues that the cumulative effect of the errors denied him a fair trial. Because we have concluded that no errors resulted, McRae's argument fails.[15]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[13] *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004), citing *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003),

[14] *Pfaffle*, *supra* at 291.

[15] *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).